UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATION BOARD
REGION 9

In the Matter of

COURIER-JOURNAL, A DIVISION OF GANNETT
KENTUCKY LIMITED PARTNERSHIP [1]/

Employer

and Case 9-RC-17807

GRAPHIC COMMUNICATIONS INTERNATIONAL
UNION, LOCAL 619-M, AFL-CIO, CLC

Petitioner

ACTING REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION

The Employer, with a facility in Louisville, Kentucky, is engaged in the publication and distribution of a newspaper (The Louisville Courier-Journal), in Louisville, Kentucky and the surrounding vicinity. The only Employer operation involved in this proceeding is its Shelby County, Kentucky newspaper distribution and delivery service. The Petitioner has filed a petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act seeking to represent a unit comprised of all the newspaper carriers employed by the Employer at its Shelby County Drop Building located at 288 Haven Hill Road, Shelbyville, Kentucky, excluding all other employees, office clerical employees, managerial employees, and all guards and supervisors as defined in the Act. There is no history of collective bargaining affecting the employees involved in this proceeding.

A hearing officer of the Board held a hearing on the issues raised by the petition and the Employer filed a brief with me. [2]/ The Employer maintains that the newspaper carriers cannot comprise an appropriate unit because they are independent contractors and, as such, they are not employees within the meaning of Section 2(3) of the Act. The Petitioner contends that the newspaper carriers are employees under the Act and that the Employer's Shelby County Drop Building carriers constitute an appropriate unit for purposes of collective bargaining. [3]/

I have carefully considered the evidence and the arguments presented by the parties on the issues. I have concluded, as discussed below, that the factors militating in favor of a finding

[1]/ The name of the Employer appears as amended at the hearing.

[2]/ Although given an opportunity to do so, the Petitioner did file a post-hearing brief.

[3]/ The Employer only asserts that the carriers are independent contractors. It does not contest the scope of the unit which is limited to its Shelby County operation.

that the newspaper carriers are employees, on balance, outweigh the evidence that they are independent contractors. Accordingly, I find that the newspaper carriers are employees who constitute an appropriate unit and I will direct an election.

To provide a context for my discussion of the issues, I will first provide an overview of the Employer's operations. I will then present, in detail, the facts and analysis supporting each of my conclusions on the issues.

I. OVERVIEW OF OPERATIONS

The Employer publishes a daily newspaper, Monday through Saturday. It publishes three editions of the paper, a state edition that is printed first and distributed to outlying areas most distant from the city of Louisville, an Indiana edition, and a Metro edition that is distributed in the greater Louisville vicinity. The daily state edition retails for 50 cents a copy. The more extensive Sunday edition retails for $1.75 a copy. Louis Sabatini is the Employer's State Division Manager. In this capacity, he oversees sales and distribution operations throughout the State of Kentucky, except for Jefferson County in which the city of Louisville is located. Twelve district managers report to Sabatini, including the district manager for Shelby County, Danny Hollar. Hollar is responsible for "contracting" with the newspaper carriers in Shelby County, a county that borders Jefferson County to the east and straddles Interstate 64 between Louisville and Lexington, Kentucky. There are about 12 newspaper carriers who deliver the Employer's products in Shelby County.

The Employer delivers the newspaper from its downtown Louisville printing plant to the Shelby County Drop Building 7 days a week. The newspapers are delivered to the drop building at about 12 midnight to 12:30 a.m., Monday through Saturday, and apparently somewhat later on Sunday because of the larger size of the Sunday edition. The papers are delivered to the Drop Building by a contract hauler. Upon delivery, a carrier who has a contract with the Employer to perform the task, unloads the papers from the truck and separates out each carrier's draw, including their "top sheets." The top sheets contain information about each draw and include any customer issues such as complaints or delivery requests.

II. NEWSPAPER CARRIERS

The 12 carriers at issue are engaged in the home delivery of the Employer's newspaper to customers on routes that are established and determined by the Employer through District Manager Hollar. At least one of the carriers also delivers competing newspaper products, including the Lexington Herald, another daily paper, and the Shelby Sentinel, a twice weekly publication. About 9 of the 12 carriers also handle what are referred to in the record as single copy sales. Single copy sales occur when newspaper carriers deliver the newspaper to a convenience store like a Seven Eleven or a Speedway, or to a vending machine, referred to in the record as a rack.

Each carrier services one or more home delivery routes. The carriers do not have any proprietary interest in their routes and cannot assign or alter them. Thus, the carriers cannot buy or sell routes. In contrast, the Employer has the right to add to or subtract from a route. In Shelby County, the smallest number of subscribers on a route is about 50 and the largest number of subscribers on a route is about 320. The carriers, or at least some of them, at least

occasionally use substitutes to make the deliveries. In this regard, there is anecdotal evidence in the record implying or suggesting that an unspecified number of carriers may use substitutes. Similarly, there is anecdotal evidence in the record that implies or suggest that an unspecified number of carriers use a substitute to assist them in the delivery of the paper on one or more of their routes. Assuming that some carriers use substitutes to do the actual deliveries on their delivery routes or to assist them in making deliveries, the record before me lacks any detail regarding these arrangements. Thus, the record does not reflect the number or identity of carriers that actually use substitutes, the frequency that substitutes are used, and the actual delivery arrangements between the carrier and the substitute, including whether there is any type of renumeration given to the substitute. Neither party claims that any substitutes should be in any unit found appropriate nor that any carrier exercises or possess supervisory authority as a result of employing substitutes.

The carriers have been delivering papers for the Employer for varying periods of time. One carrier has been delivering papers on the same route for about 20 years, and others have been carriers for lesser periods of time ranging from several years to as little as several weeks. Some carriers have other full-time employment, including working in a nursing home and in an investment firm. Some carriers have other part-time employment, including working in a music store and as a farmer. On the other hand, some of the carriers apparently do not have regular employment outside their newspaper delivery jobs. There is no evidence that any carriers have incorporated. However, two of the carriers testified that they have their income tax returns prepared by tax professionals and that the tax returns indicate that the carriers are self-employed.

All carriers sign "Home Delivery Wholesale Agreements" with the Employer. These agreements are required by the Employer, are non-negotiable, do not reflect the wholesale price paid by carriers, and are identical on their face with the exception of individual route designations. The agreements cover the carriers' performance of home delivery sales as well as single copy sales. The record discloses that recently the Employer errantly signed three Shelby County carriers to "Home Delivery Service Agreements." The most significant difference between the wholesale agreements and the service agreements is the method of compensation. The wholesale agreement contemplates a buy/sell arrangement under which carriers purchase newspapers from the Employer at a rate determined by the Employer and the carriers then "sell" the papers to customers on their routes at a retail rate that is also determined by the Employer. The service agreement contemplates a per piece compensation arrangement under which the carriers are paid a specified amount, as set by the Employer, for each paper that they deliver. The record reflects that despite the per piece arrangement entered into between the Employer and three of the Shelby County carriers, those carriers are actually compensated in the same manner as are the other Shelby County carriers, that is under a buy/sell arrangement established by the Employer. The wholesale and service agreements both state that they are between the Employer and an "independent contractor." All of the wholesale agreements are effective for 1 year, with an automatic renewal for successive 1-year periods unless terminated by mutual agreement, material breach, 30 days advance written notice to the other party, or death of the carrier.

Home delivery customers pay for their subscriptions in advance and the Employer acts as the carriers' agent for the purpose of receiving paid in advance subscriptions and for the purpose of applying these credits to carriers' accounts on a pro-rata weekly basis. In this regard, the Employer generates a billing statement each week for each of the carriers. This statement includes all of the charges incurred by the carriers, most significantly what each of them pays the

Employer for their daily draw of newspapers, and also includes all sums owed by the Employer to the carriers, most significantly the amount that each is owed or credited for the newspapers that they have delivered to subscribers. Carriers do not collect directly from home delivery customers, but customers make payments directly to the Employer.

The record discloses that home delivery customers are charged a certain rate by the Employer depending on whether they take delivery of the paper on a six day subscription, a seven day subscription, a Sunday only, or a weekend.[4] The Employer then pays out to the carriers the difference between the rate paid by customers and the rate that it charges each carrier for the newspapers. These rates are set by the Employer and are not subject to negotiation. However, some carriers pay the Employer less for newspapers than do other carriers. For example, two of the twelve carriers are charged 30 cents for daily single copies whereas other carriers are charged 34 cents for daily single copies. Additionally, the same two carriers pay $1.27 and a fraction for Sunday single copies and others pay $1.31 and a fraction.

The bills received by the carriers from the Employer each week also reflect other debits and credits. Examples of carrier debits include bond charges, the weekly cost for the bond that the Employer requires each carrier to post, and rack charges, the amount that the Employer charges to carriers who lease racks from it. Examples of carrier credits include fees that carriers receive for handling inserts, special paper sections, fees for hauling papers to other carriers, and fees for servicing "direct dealers." Direct dealers are large retailers, such as Wal-Mart, that typically negotiate special rates directly with the Employer and the Employer then pays the carriers a set amount to deliver papers to the direct dealers. The Employer refers to these direct dealer credits as "office paid subscriptions." One carrier testified that he receives $50 a week for delivering newspapers to a Wal-Mart store and $5 a week for delivering papers to a Short Stop, a combination Chevron Station and mini-mart.

The wholesale agreement does not specify the rate of compensation. However, record testimony reflects that the carriers buy the papers from the Employer at the wholesale rate and that they simply keep any profit from the sale of newspapers at racks and stores they service. In this regard, the carriers are responsible for collecting money from their racks and from the store merchants with whom they have single copy arrangements. The Employer owns the racks and the carriers are charged a rental fee of about 25 cents a week, although the Employer sometimes charges a lesser promotional rate for new racks. Carriers sometimes suggest locations for racks but the district manager determines whether a particular rack site is a good location for paper sales. Carriers are permitted to return a "reasonable amount" of papers at no cost to them when the papers are not purchased from stores or racks. The Employer credits the carriers for these returns, which are evidenced by cut out mastheads of the unsold newspapers.

Carriers can request an increase in their single copy draws if they believe that they can sell additional papers through merchants or racks. The Employer sometimes increases carriers' single copy draws without a request by the carriers. This occurs when high profile news events

[4]/ The Employer does not offer home delivery to some customers on a daily basis, primarily because of their remote locations. These customers receive home delivery of the Sunday newspaper only and such routes are referred to as "Sunday only loops."

lead the Employer to anticipate a higher than usual sales volume. Carriers allocate their single copy draw between merchants and racks.

In theory, carriers have the ability to negotiate with store merchants the amount that the store will receive as its share of the profit. This is an amount between the wholesale price to the carrier and the retail price that is set by the Employer. Testimony discloses that in practice stores receive about 5 cents a copy for daily papers and about 10 cents a copy for Sunday papers, with the carrier receiving the remainder of the difference between the wholesale and retail price of the paper. One carrier testified that his district manager told him that he was to charge his store locations the same amount that the previous carrier had charged the stores. Carriers assume the risk of loss for uncollected debts from store merchants and from the theft of newspapers from racks.

The Employer provides most of the carriers with a weekly route allowance, the amount of which is based principally on the district manager's evaluation of the profitability and desirability of a particular route. State Division Manager Sabatini and State Supervisor Brown make the final decision regarding any changes in route allowances. Thus, carriers who have routes with few subscribers, more rural routes or routes that have bad roads receive a higher route allowance in comparison to carriers whose routes have a large number of subscribers and more desirably located. The Employer has determined that some routes warrant an allowance of as much as $80 a week, whereas other routes do not receive an allowance. Carriers can request an increase to their weekly route allowance but Sabatini and Brown determine how much, if any, additional allowance will be granted. The district manager is not authorized to make such adjustments.

The district manager determines when and whether deliveries should be added to or subtracted from a route. It appears that sometimes he initiates a route change on his own and sometimes the impetus for a change will come from a carrier. Carriers are permitted to add customers within their route zones as designated by the Employer, but they are not permitted to cease delivering to customers or to otherwise modify their route zones. District Manager Hollar testified that when there is an open route he looks at it to see how it fits with the routes being run by the existing carriers apparently for purposes of determining who to offer it to or whether to divide any portion of the route.

Carriers' ability to increase their customers on their own is limited. In this regard, the Employer utilizes telemarketers who are permitted to offer prospective customers deals on rates and free newspapers that the carriers do not have the authority to match. The record reflects, however, that carriers have prepared their own brochures and have offered sample papers to prospective customers to entice them to subscribe. New customers have been obtained in this manner, although the record reflects that the number of new customers so acquired is minuscule in comparison to the effort expended. For example, a carrier testified that at the behest of the district manager he put out several hundred samples and some circulars that another carrier had created. From this effort he obtained one new customer.

The district manager does not interact with the carriers on a daily basis. He is responsible for a total of about six or seven drop sites, including the Shelby County Drop Building. Accordingly, he is only occasionally at the Shelby building. There is an office in the building for

his use. Other than the carrier who is retained to unload the newspaper delivery truck and to distribute the papers, the Employer does not employ anyone to work out of the drop building.

Carriers are recruited for open routes through newspaper advertisements. The district manager also checks with other carriers about interest in open routes. He interviews prospective carriers and determines whether to offer a route contract to an applicant. The district manager's "orientation" of the carriers appears to be limited to taking new carriers or carriers who are adding routes, out on the routes and showing them where the customers are located.

Carriers are responsible for providing their own transportation to make their deliveries. They must prove to the Employer that they have valid drivers' licenses that their vehicles are registered, and that their vehicles carry, at least, the minimum insurance required by Kentucky. Additionally, carriers are required by the wholesale agreement to provide the Employer with the same information for any other driver who is used to perform deliveries. The carriers are required to pay for their own insurance and gas. They are not directly reimbursed for their mileage, but, as noted, route allowances are higher for less dense and more rural routes.

The Employer does not require the carriers to pick up their papers at the drop building by any certain time, but it does require them to have the papers delivered by 6 a.m. on weekdays and Saturdays and by 7 a.m. on Sundays. Carriers are not required to wear any items with the Employer's logo and are not permitted to have anything on their vehicles identifying them as carriers for the Employer. Indeed, the agreements that they sign with the Employer specifically prohibit them from placing on their vehicles any logos or other marks identifying them with the Employer. The record discloses that the Employer provided some carriers with hats within about a month of the hearing in this matter with the Employer's name on them. However, carriers are not required to wear the hats and there is no evidence that they do.

Carriers make their route deliveries in any manner that they choose and are constrained only by the Employer's delivery times. Carriers generally make deliveries in the most timely and cost effective manner possible. However, they are free to deviate from their regular delivery pattern and may take breaks as they wish. As indicated above, carriers are permitted to deliver other products at the same time that they deliver the newspaper. However, the delivery of other products cannot interfere with the timely delivery of the Employer's newspaper. The carriers are responsible for ensuring that customers on their routes are properly serviced through timely delivery of papers in good and dry condition. In this regard, they deliver papers in several different ways as dictated by weather conditions and to locations requested by customers.

Carriers are expected to obtain their own substitutes when they are unavailable to make deliveries. They do not need approval from the Employer regarding the identity of their substitute or substitutes and in some instances the Employer may be unaware of the identity of a substitute who is handling a route. However, as noted above, the agreement requires that the carriers provide the Employer with driver and motor vehicle records for any substitute driver as well as records for any motor vehicle to be used in the delivery of the paper. The Employer is not involved in the remunerative arrangement between the carrier and his or her substitute. However, the Employer holds the carrier responsible for any failure on the part of the carrier's substitute and the carrier bears any cost undertaken by the Employer to deliver the carrier's route as a result of the failure of either a substitute or carrier to make timely delivery of the paper.

Customer complaints are typically made to the Employer at its Louisville facility. It is the carrier's responsibility to address and rectify any service complaints, such as a missed delivery. If a carrier misses a delivery and the Employer has to make the delivery, the carrier may be charged the full cost of the paper. If a customer registers a complaint with the Employer, the complaint is entered into the Employer's computer system. A note briefly describing the nature of the complaint is then placed on the carrier's "top sheet" with the following morning's product to be delivered.

If a carrier continues to experience service issues on his or her route the district manager will discuss these issues with the carrier. The district manager has the option of terminating a carrier's contract for breach if the carrier fails to rectify delivery issues relating to timing or quality. The Employer apparently does not take any other disciplinary actions against carriers short of terminating their contracts.

The Employer provides carriers with IRS 1099 forms each year showing their earnings and also covers them under the applicable workmen's compensation statute in Kentucky. However, the Employer does not provide carriers with unemployment insurance, a W-2 form, and does not make any tax or social security deductions from their earnings. Carriers do not receive the fringe benefits that the Employer accords to other employees. However, the Employer offered the carriers the opportunity to purchase accident and death insurance at their own cost through the same company that it uses for bonding the carriers. The Employer's employees are not eligible to purchase this same insurance.

All carriers are required to be bonded. The district manager and his superiors set the amount of the bond. They determine the Employer's potential exposure to loss if the carrier should default or if there is a need to terminate for material breach. In this regard, they consider the number of routes that a carrier services, the size of the route or routes, and the number of customers. Bonds for Shelby County carriers range from $500 to $1,100 or $1,200. The Employer utilizes a bonding company for this purpose that charges the carriers about 15 cents for each $100. Carriers are required to utilize the bonding company provided by the Employer.

III. THE LAW AND ITS APPLICATION

Section 2(3) of the Act provides that the term "employee" shall not include "any individual having the status of independent contractor." The burden of establishing that an individual is an independent contractor rather than an employee rests with the party asserting independent contractor status. *BKN, Inc.*, 333 NLRB No. 14 (2001). Under Section 2(3) of the Act, the Board applies a multifactor test developed under the common law of agency to decide whether an individual is an employee or an independent contractor. *NLRB v. United Insurance Co. of America*, 390 U.S. 254 (1968); *Roadway Package System, Inc.*, 326 NLRB 842 (1998); *Dial-A-Mattress Operating Corp.*, 326 NLRB 884 (1998). In determining whether individuals are employees or independent contractors, the Board in *Roadway* expressly adopted the multifactor analysis of the Restatement (Second) of Agency, Section 220 (1958).

Under the Restatement (Second) of Agency:

(1) A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control.

(2) In determining whether one acting for another is a servant or independent contractor the following factors, among others, are considered:

(a) The extent of control the employer exercises over the individual's work details.

(b) Whether the person employed is engaged in a distinct occupation or business.

(c) Whether the work of that occupation is usually performed under an employer's supervision.

(d) The skill required by the occupation.

(e). Whether the employer or the worker supplies instrumentalities, tools, and the place of work.

(f) The length of employment.

(g) Whether payment is made according to the time spent or by the job.

(h) Whether the work is part of the employer's regular business.

(i) Whether the parties believe they are creating an employer-employee relationship.

(j) Whether "the principal is or is not in the business."

Under the Restatement (Second) of Agency, the right of control continues to be paramount in determining independent contractor status. Nevertheless, the other factors are considered important and must be weight in determining whether the right of control is present in any given situation. For example, *Roadway* involved pick up and delivery drivers at two of the employer's terminals whom the Board found to be employees rather than independent contractors. In reaching this conclusion, the Board applied the common law of agency test as set forth in the Restatement (Second) of Agency. Specifically, the Board relied on the following to support its finding:

> [T]he drivers here do not operate independent businesses, but perform functions that are an essential part of one [employer's] normal operations; they need not have any prior training or experience, but receive training from the [employer]; they do business in the [employer's] name with assistance and guidance from it; they do not ordinarily engage in outside business; they constitute an integral part of the [employer's] business under its substantial control; they have no substantial proprietary interest beyond their investment in their trucks; and they have no significant entrepreneurial opportunity for gain or loss. *Roadway*, supra, at 851.

The Board also noted that:

> Other support for employee status can be found in [the employer's] compensation package for the drivers. Here, [the employer] establishes, regulates, and controls the rate of compensation and financial assistance to the drivers as well as the rates charged to customers. Generally speaking, there is little room for the drivers to influence their income through their own efforts or ingenuity. Id. at 852.

The Board expressly held in *Roadway* that the common law of agency test, "encompasses a careful examination of all the factors and not just simply the right of control." Id. at 850.

The Board reached the opposite conclusion with respect to delivery drivers in *Dial-A-Mattress*, the companion case to *Roadway*. The Board concluded in *Dial-A-Mattress* that the common law of agency test factors weighed more strongly in favor of independent contractor status for the drivers in that case. In finding the drivers to be independent contractors, the Board relied, in part, on the fact that the drivers had, "significant entrepreneurial opportunity for gain or loss." Id. In that regard, the Board noted that some drivers had more than one van to perform deliveries, that they could and did negotiate economic terms in their agreements with the employer, and that they had no guaranteed minimum compensation. Id. at 892. Additionally, they could decline to work or make their trucks available on certain dates without advance notice to the employer and without penalty. Id. at 887. The Board distinguished *Dial-A-Mattress* from *Roadway* in part on the basis that the "elements of Roadway's compensation plan, in effect, result in both minimum guarantees and effective ceilings for its drivers" and the fact that, "Roadway drivers are required to provide delivery services each scheduled workday." Moreover, there was "no evidence that the Roadway drivers [could] negotiate . . . special deals." Id. at 893.

Following the issuance of *Roadway* and *Dial-A-Mattress*, the Board has issued several decisions involving independent contractor issues. However, none of those cases have involved individuals who deliver newspapers. Rather, recent cases have considered the employee/independent contractor status in occupations such as those of car haulers, pick up and delivery drivers, taxi drivers, and free lance writers, artists, and designers. In each case, the Board found the individuals to be employees. Thus, in *Time Auto Transportation, Inc.*, 338 NLRB No. 75 (2002), the Board affirmed the ALJ's finding that car haulers were employees rather than independent contractors. In making this finding the ALJ relied in part on the fact that the employer had a "direct financial stake" in the amount of cargo hauled by drivers as it received a percentage of the gross for each load. Id. slip op. at 20. Indeed, the ALJ found that the employer controlled the "manner and means in which an employee generates income." Id. slip op. at 22. The ALJ also noted that the drivers, like the carriers here, had to accept the independent contractor agreements presented to them and they could not be negotiated. Id. slip op. at 9.

In *Slay Transportation Co.*, 331 NLRB 1292 (2000), the Board reversed a regional director's finding that owner-operator truck drivers were independent contractors. In finding the drivers to be employees the Board relied, in part, on the fact that the drivers performed functions that were at the core of the employer's business, they could not negotiate special pay deals with the employer, and they had little entrepreneurial opportunity for financial gain or loss. Id. at 1294. In addition, the Board noted that drivers could hire substitutes but that they could only negotiate a substitute's wages within the compensation rate set by the Employer. Id.

In *Corporate Express Delivery Systems*, 332 NLRB No. 144 (2000), the Board affirmed a finding by the ALJ that owner-operators were employees rather than independent contractors. In upholding the ALJ, the Board found that the employer's package pickup and delivery drivers, like the carriers here, had "no proprietary interest in their routes and no significant opportunity for entrepreneurial gain or loss." Id. In this regard, the Board noted that "The routes, the base pay, and the amount of freight to be delivered daily on each route are determined by [the employer], and owner-operators have no right to add or reject customers." Moreover, the employer in *Corporate Express*, like the Employer here, "incur[ed] no liability for unilaterally terminating an owner-operator's contract." Id.

In *Stamford Taxi, Inc.*, 332 NLRB No. 149 (2000), the Board, in agreement with the ALJ, held that a unit of taxi drivers were employees rather than independent contractors. In reaching this conclusion, the Board re-emphasized that the common law agency test, under which all aspects of an individual's relationship to an employing entity are examined, is the appropriate analysis to use in assessing a disputed individual's independent contractor status. The Board noted that factors impacting on the "right to control" were significant, but so were those that did not include the concept of control. Id. slip op. at 2. The Board specifically noted in *Stamford Taxi* that restrictions placed on the taxi drivers by the employer resulted in their having no significant entrepreneurial opportunity for gain or loss and no meaningful proprietary interest in their cabs. Id. Additionally, the Board found that the employer, in *Stamford Taxi*, like the Employer here, unilaterally drafted, promulgated, and changed the lease agreements that the taxi drivers signed. Id. The Board concluded that the drivers in *Stamford Taxi* were employees even though the lease agreements, like those here, defined the drivers as independent contractors, the drivers paid their own taxes, and the employer made no payroll withholdings on their behalf.

In *BKN*, the Board found in agreement with the regional director that freelance writers, artists, and designers were employees, rather than independent contractors. With regard to the writers specifically, the Board based its finding on the fact that the employer exercised extensive control over them through the imposition of time deadlines and editorial review of the content of their work. Id. slip op. at 4. The Board also noted that, "the writers, like the carriers here, clearly perform functions that are an essential part of the [employer's] normal operations, and they constitute an integral part of the [employer's] business under its substantial control." Id. The Board found the writers to be employees although a number of factors militated in favor of independent contractor status. Those factors supporting an independent contractor finding, many of which are present here, included: "the writers work out of their homes, set their own hours, provide their own equipment and materials, are not subject to discipline, sign agreements to work on each episode, are paid per episode, may work for other employers, receive no benefits, and have no taxes or other payroll deductions withheld." Id.

Following the issuance of the *Roadway* and *Dial-A-Mattress* decisions, the employee versus independent contractor status issue in the newspaper delivery industry was addressed by the ALJ in *St. Joseph's News Press*, JD(SF)-68-01 (September 6, 2001), (currently pending before the Board on exceptions). Although an ALJ decision which has not been reviewed by the Board is not binding precedent on me, it provides a helpful analysis of the issues here, like in Cases 9-RC-17554 and 9-RC-17809 and the Employer has addressed the applicability of *St. Joseph's* in its brief. Initially, I note that there are numerous factual similarities between *St. Joseph's* and the subject case. Such similarities include the following facts noted by the ALJ:

1. The carriers' contracts emphasize they will be working as independent contractors.

2. The carriers sign their contracts as individuals.

3. The carriers' contracts prohibit them from displaying the Respondent's name on their vehicles.

4. The carriers do not wear uniforms.

5. The contracts mandate that the carriers are responsible for providing their delivery services 7 days a week.

6. The contracts direct that the carriers deliver their newspapers before 6 a.m. on weekdays and Saturdays, and before 6:30 a.m. on Sundays. (The delivery times are not specified here in the agreements, but carriers are required to make their deliveries in compliance with those times set by the Employer.)

7. The carriers are responsible for providing a substitute if they are unable to personally perform their contractual obligations.

8. The contracts allow carriers to hire helpers and substitutes without prior approval from [the employer], but carriers have no right to assign or subcontract their routes nor can they trade routes.

9. The carriers have no interest or property right in the route, the bundle drop site, or the subscribers.

10. The carriers' one large investment is the vehicle they need to perform their deliveries.

11. The carriers are required to indemnify [the employer] and are responsible for damages caused by them or their substitute carriers while delivering newspapers.

12. Should a carrier default in making his deliveries [the employer] will make arrangements to deliver the route and charge him for the cost it incurs.

13. Either party must give the other party 30-days' written notice before terminating the contract "without cause."

14. [The employer] decides where racks are located and what news dealers will receive papers.

15. [The employer] may eliminate or add newspaper locations based on its assessment of profitability.

16. The newspaper bundles contain messages that notify the carrier of such things as new customers names and addresses, where the customer wants the paper delivered (e.g. in the driveway or on the porch), and temporary stops of delivery for vacationing customers, etc.

17. [The employer] determines the geographical area covered by a particular route. [The employer], in its discretion, may cut or enlarge a route.

18. [The employer] issues the carriers IRS 1099 forms each year showing their earnings. No income taxes are withheld from the carriers' earnings.

19. [The employer] provides the contract and unilaterally changes its terms with ease.

20. The carriers are required to purchase their own supplies such as rubber bands and bags. (Here, they may purchase such supplies from the Employer, or they may purchase t hem from another source.)

21. The carriers "buy" most of the papers that they deliver, including papers for home delivery and for single copy sales that are sold through racks (vending machines) and through dealers.

Moreover, although there are some facts in *St. Joseph's* that differ from those found here, the distinctions between the two cases appear minor. In *St. Joseph's* the carrier agreement specifically required that the carriers provide the employer with the name of a person who can be called if the carrier is unavailable. No such requirement exists here. However, the carriers here are required to provide the Employer with Department of Motor Vehicles' records for any driver or motor vehicle to be used in performance of the agreement.

In *St. Joseph's* the ALJ found that certain carriers negotiated with the Employer to deliver newspapers at a negotiated per piece rate which would militate in favor of an independent contractor finding. Here, there is no evidence of negotiation. Additionally, in *St. Joseph's* the employer paid a gas subsidy to carriers. Although the Employer does not pay a direct gas subsidy, nearly all of the carriers receive route allowances that take into account the rural nature of a route. Thus, here gas and other transportation costs are indirectly subsidized.

In addition, *St. Joseph's* the employer posted a list of the sequence in which carriers received their papers for loading at the employer's facility. There is no evidence here of any established sequence in which the carriers receive their newspapers, but all carriers must pick up their papers in time to meet the Employer's imposed delivery schedule. The employer in *St. Joseph's* also instructed carriers when they were to make "drops" in relation to other duties performed on their route, including when to deliver mailbags of newspapers to post offices. No such delivery instructions have been shown to exist here.

The ALJ in *St. Joseph's* noted that the carriers and haulers did not operate independent businesses and that they devoted virtually all their time and efforts toward providing the essential functions of the employer's newspaper business. Likewise, there is no evidence here that the carriers operate independent businesses. However, some carriers have other gainful employment and, at least, one delivers other papers.

The ALJ in *St. Joseph's* reviewed the factors relating to the independent contractor inquiry and concluded that the record supported the conclusion that the carriers and haulers were employees within the meaning of Section 2(3) of the Act. In reaching this conclusion, the ALJ

noted that the carriers, like those here, had "little realistic entrepreneurial opportunity for gain or loss." Indeed here, there are a number of factors that provide a stronger case for finding an employer-employee relationship than in *St. Joseph's*. For example, the carriers here, unlike those in *St. Joseph's*, for the most part, are not responsible for collecting for the sale of papers and do not suffer the loss for nonpayment. Such factors are supportive of an employer-employee relationship finding.

Further, the ALJ in *St. Joseph's* also acknowledged the existence of a series of pre-*Roadway* newspaper cases, which continue to be relied on by the Employer, where the carriers and others in the newspaper industry were found to be independent contractors. The ALJ noted that these cases were apparently analyzed on the basis of the "right to control" test rather than the common law agency test set forth by *Roadway* and *Dial-A-Mattress*. Although the Board has not specifically overruled the pre-*Roadway* and *Dial-A-Mattress* cases, and I have considered them in reaching my decision, I do not, in view of *Roadway* and *Dial-A-Mattress*, view them as controlling precedent or requiring a finding that the carriers here are independent contractors. Indeed, the ALJ concluded that the precedential authority of those pre-*Roadway* cases in the newspaper industry was marginal as they appeared to be based on an incomplete analysis of the common law agency test.

In analyzing the status of the carriers here, I acknowledge that some factors militate in favor of finding them to be independent contractors. However, applying the *Roadway* and *Dial-A-Mattress* criteria to the subject case with due consideration of a pre-*Roadway* and *Dial-A-Mattress* precedent, like the ALJ in *St. Joseph's*, I conclude, as in previous Cases 9-RC-17754 and 9-RC-17809, that the newspaper carriers here are employees within the meaning of Section 2(3) of the Act. As noted, *Roadway* and *Dial-A-Mattress* did not specifically overrule the pre-*Roadway* and *Dial-A-Mattress* decisions. However, the Board did make clear that all incidents of the parties' relationship, under the common law test of agency, must be considered in determining employee or independent contractor status rather than simply the right of control test primarily relied on by the Board in pre-*Roadway* and *Dial-A-Mattress* cases. Certainly, the right of control an employer has over the manner and means of the work being performed continues to be important in determining employee or independent contractor status. However, having carefully considered all the common law test of agency factors present in this case, including the right of control, I am of the opinion that the evidence militating in favor of finding that the carriers are independent contractors is outweighed by those factors indicating that they are employees.

In any event, even if the rationale of the pre-*Roadway* and *Dial-A-Mattress* cases in the newspaper industry is applied here, I am of the opinion, based on the existing factors, that the Employer's newspaper carriers are employees and not independent contractors. See, *Beacon Journal Publishing Co.*, 188 NLRB 218 (1971) (similar facts, although no written agreement). Certainly, under *Roadway* and *Dial-A-Mattress*, the carriers here are employees. In reaching my conclusion, I note in particular that the carriers do not have the ability to negotiate the terms of the contract with the Employer. As was true in Cases 9-CA-17554 and 9-CA-17809, the carriers here have, at best, a minuscule opportunity for entrepreneurial gain or loss even though they are operating under a buy/sell arrangement unlike the carriers in the two prior cases involving these parties. This fact does not serve to distinguish this case because the Employer sets the price at which newspapers are sold to carriers and, with possible minimal variation in the wholesale price to merchants, the price at which the carriers sell the newspapers to customers. Moreover, any

risk of loss to the carriers is minimized because the Employer handles collections for home delivery customers and remits amounts so collected (apparently without interest) to the carriers. A detailed discussion of the application of the *Roadway* and *Dial-A-Mattress* criteria (common law agency test) to the facts here is set forth below.

1. Extent of Control Over Work Details

The Employer requires carriers to deliver its product by specified delivery times each day. Although there is no required starting time, carriers must pick up their papers, or have a designee do so, in a sufficient time to complete timely delivery. Although carriers have discretion to accomplish their deliveries in the manner that they choose, they must comply with the Employer's specified delivery times and the Employer's requirement that the paper be delivered in a dry and readable condition. This essentially means that they can determine whether to deliver the paper to a customer's driveway, doorstep, or other location requested by a customer. Additionally, carriers can determine whether to rubber band a paper, deliver it flat, or whether to use a delivery tube. If the carrier fails to perform deliveries the Employer will make the deliveries or retain a substitute to do so. However, if the Employer has to make a delivery for a carrier, the Employer charges the carrier the costs for making the delivery. The charge can be equal to the retail price of the newspaper. Further, the failure of the carrier to perform is considered a material breach of the contractual agreement.

The choice of a substitute belongs to the carrier and it appears that in practice the carrier does not always disclose the identity of the substitute to the Employer. However, I note that the applicable agreements between the Employer and the carriers require that the carriers provide the Employer with a copy of Department of Motor Vehicle records for any driver used in performance of the delivery agreements with the Employer. Although the Employer may not always demand these documents or be apprised of the identity of substitutes, the contracts clearly give it the right to obtain this information.

Carriers may deliver competing products while they make their deliveries for the Employer. However, the record indicates that such opportunities are limited. At least one carrier also delivers the Lexington Herald, a daily paper in competition with the Employer, and the Shelby Sentinel, a twice-weekly newspaper. Neither of these products is a daily paper that focuses on news specific to Louisville, Kentucky and the surrounding vicinity, although there is apparently some market overlap between the Employer's product and the Lexington Herald in eastern Shelby County. There is no evidence of another daily newspaper focusing on local news and events that emanates from Louisville.

The record discloses that the contracts that the carriers sign are identical and that the Employer unilaterally imposes these agreements on the carriers on a take it or leave it basis. The parties do not negotiate the terms of these agreements. However, the Employer may make adjustments in route allowances with input from the carriers. The Employer also makes such adjustments without carrier input and it is the Employer who ultimately determines what, if any, adjustment will be made. Route allowances are used by the Employer to enhance the attractiveness of those routes that are considered less desirable because of their rural nature, sparse subscription density or poor roads. The Employer controls the size and number of routes that a carrier has and makes adjustments to delivery routes to ensure that they are balanced and

can be completed by the specified delivery times. Route adjustments are sometimes made at the request of and with the input of carriers, while other changes emanate solely from the Employer.

I conclude that an analysis of the evidence related to this factor, on balance, favors a finding of employee status. In reaching this conclusion, I note that the work details that are left to the discretion of the carriers are largely menial and somewhat illusory in nature. Although the Employer does not specify starting times, the fact that it requires a deadline for delivery and the fact that the papers are available with only a few hours to spare, indicates significant control over the timing of the performance of the carriers' duties. Moreover, news is only "news" if it is fresh and the nature of the product itself dictates delivery within a tight timeframe. As for actual delivery, the carriers are limited to the geographic routes granted by the Employer. Although carriers may decide the order in which deliveries are accomplished, as a practical matter, even their discretion in this area is greatly limited, as the carriers will undoubtedly make their deliveries in the most efficient manner as dictated by the amount of fuel and time needed to complete their routes. Thus, the manner in which the papers are delivered does not show true independence on the part of carriers in accomplishing their task. Rather, the delivery method is circumscribed by the Employer's requirement that the papers be delivered by a certain time, in a dry and readable condition and by the carrier's need to satisfy the Employer's customers. The record is clear that carriers who fail to consistently satisfy the Employer's customers will lose their routes. Finally, in reaching my conclusion, I have considered the facts that carriers are allowed to use substitutes to perform their deliveries or assist them in making deliveries. However, because the record before me lacks the necessary details about the circumstances surrounding the carriers use of substitute, I find that standing alone the carriers' ability to use a substitute is not dispositive of their independent contractor status. *Slay Transportation*, supra.

2. <u>Distinct Occupation or Business</u>

The carriers are not engaged in a distinct occupation or business. Rather, the service that they perform, the delivery of the Employer's daily and Sunday newspapers, is arguably part of the Employer's business. Indeed, the ALJ in *St. Joseph's* found that the delivery of the paper was an integral part of the Employer's business. I recognize that it could be argued that the Employer is engaged in merely publishing a newspaper and that the distribution of the paper is a distinct operation which the Employer has elected to subcontract. However, whether the publication and distribution of the paper is viewed as separate operations here is not controlling based on the oversight the Employer maintains over the delivery of its papers which restricts any realistic opportunity by the carriers to engage in true entrepreneurial activities. Thus, the carriers here, unlike the drivers in *Dial-A-Mattress*, have not made significant investment in their own business with substantial opportunity for gain or loss. Moreover, unlike the drivers in *Dial-A-Mattress* who could decline work for a day or more without punishment, the carriers here must deliver the newspaper each day. If the carrier fails to deliver the paper, the Employer makes the delivery and imposes the costs on the carrier and the Employer could, at its discretion, cancel a carrier's contract for nonperformance. Accordingly, I find that the evidence pertaining to this factor favors a finding of employee status.

3. <u>Whether Newspaper Carrier Work is Performed Under Supervision</u>

The carriers, as noted, receive only minimal supervision after an initial orientation period that lasts a few days. During the initial orientation period the district manager typically rides the

route with a new carrier to ensure that the carrier is familiar with his/her route and customers. Following this initial orientation, the district manager does not interact with carriers on a daily basis. The type of work involved, the delivery of newspapers, typically is not the subject of close supervision as the bulk of the performance of the work occurs away from any facilities maintained by the Employer. Moreover, the work is routine in nature, requires minimal skill and, therefore, the need for oversight is limited. Finally, customer feedback directly to the Employer ensures that the carrier performs competently and that a level of customer satisfaction is maintained.

I find that the evidence regarding this factor does not strongly favor either employee or independent contractor status. On the one hand, there is little day-to-day supervision by the Employer. On the other, the nature of the task and the fact that it occurs away from the Employer's facilities lends itself to minimal supervision.

4. Required Skills

The work performed by carriers requires dependability and timeliness, but does not involve any particularized skills. Other than the brief orientation referenced above, there is no specialized training given or needed. Carriers must have a satisfactory driving record and a valid commercial driver's license. The record does not disclose under what circumstances a carrier would be denied a contract if there were deficiencies in his/her driving record. However, the Employer has a right to such information under the contract and presumably would use it to guard against the potential liability that an individual with a poor driving record might represent. Here, the Employer may easily substitute one carrier for another or replace a carrier on his or her route with a new hire who requires only a minimal amount of training. Based upon the lack of specialized skills for a carrier position, I find that the evidence related to this criterion favors a finding of employee status.

5. Who Supplies Instrumentalities, Tools, Place of Work

Carriers are responsible for providing their own properly licensed and insured vehicles to perform deliveries. The Employer provides the carriers with a table area within its drop building where one of the carriers stage the papers for the other carriers and where the carriers receive their draw numbers, notification of any customer issues, and where they arrange and load their papers for delivery. Carriers are responsible for purchasing their own supply of rubber bands and plastic bags that are used to protect newspapers against inclement weather, although they may purchase such supplies from the Employer. The exception is that the Employer provides carriers with advertiser supplied bags from time to time that the carriers are required to use.

The evidence related to this factor is again somewhat equivocal in determining the employee versus independent contractor status of the carriers. Thus, the carriers provide the principal tool for their task, their own vehicles and the Employer does not specify the type of vehicle to be used. However, the Employer does require proper licensing and insurance. Additionally, the Employer provides the carriers with a location to assemble the newspapers for daily deliveries, although carriers are responsible for obtaining their own delivery supplies.

6. Length of Employment

Many of the carriers have delivered the Employer's paper for many years. Others have worked as carriers for only a brief period of time. Some carriers hold other employment, including working in a nursing home, investment firm, in a music store, and as a farmer, while others apparently have no other employment. All carrier contracts are for a 1-year duration and continue for successive years unless there is a material breach or termination by one of the parties.

I find that the evidence pertaining to this factor, on balance, favors employee status. Although the record does not disclose how many of the carriers are long term employees of the Employer, at least some of them are quite long term – in excess of 20 years. This type of longevity with one employer is indicative of an employer/employee relationship as it suggests the type of permanence that such a relationship frequently fosters, rather than the generally more ephemeral relationship experienced in the employer/independent contractor context.

7. Compensation - Hourly or By the Job

The carriers do not have any proprietary interest in their routes and there is little entrepreneurial opportunity for gain or loss. In theory, they may sign up new subscribers on their established routes and may receive an unspecified bonus for each new subscriber. However, in practice, carriers are not authorized to offer special deals to prospective customers and cannot compete with the Employer's telemarketing efforts in which subscription specials or deals are routinely offered to new customers. Indeed, the Employer not only makes most of the initial sales but collects for the costs of the papers. Thus, the carriers do not suffer any risk of loss. Carriers may also suggest store or rack locations to the district manager as a means of selling more papers, thereby enhancing their earning capacity. However, in practice the Employer's rack rental fees and the theft of papers from racks limits profitability. Additionally, it is the district manager who ultimately determines whether a particular rack location is feasible and the district manager may unilaterally increase or decrease a carrier's draw for rack or store sales if sales are believed to warrant the change. This is particularly likely to occur when significant news events cause a spike in the demand for the Employer's product. In addition, the risk of loss to carriers is minimal as the Employer buys back the unsold papers as long as returns are kept at a "reasonable amount," characterized in testimony as 15 to 20 percent.

As noted, carriers are primarily compensated through a buy/sell arrangement. However, the Employer has already presold the newspapers delivered to customers' homes through paid in advance subscriptions. These presold newspapers are then credited to carriers' accounts and prorated weekly over the length of the subscription against the papers "bought" by the carriers and reflected as a debit on the carriers' bills. The difference between these preset and non-negotiated amounts represents the carriers' profit for home deliveries, excluding additional credits and debits for expenses, bonuses, and tips. This arrangement is imbued with an absence of risk or room for entrepreneurial discretion. Although the papers that carriers sell through store merchants and racks are purchased by the carriers at a wholesale rate, the carriers, even here, exercise little entrepreneurial discretion. In the case of stores, carriers divide the difference between the wholesale and the retail price (set by the Employer) with the merchants. The record discloses that merchants typically receive a nickel profit from each daily paper sold and a dime

profit from each Sunday paper sold. Moreover, some carriers who deliver papers sold by the Employer to stores like Wal-Mart are paid a flat fee for delivering the papers.

I find, on balance, the evidence regarding this factor suggest employee status. Although payment is under a buy/sell arrangement, and not hourly, there is almost no opportunity for entrepreneurial gain or loss given the fact that the Employer sets the rates at which customers purchase the paper and at which carriers "buy" the paper from it. Such lack of ability to significantly affect earnings suggests an employer/employee relationship.

8. Part of Employer's Regular Business

The work involved here, the delivery or circulation of the Employer's newspaper, is arguably a part of the Employer's regular business. Without delivery the Employer's product would not likely reach many of its customers. Thus, the carriers' delivery of the papers to the homes of the Employer's customers, newspaper racks and retail stores, would tend to support that the carriers perform a part of the Employer's business. Even if the distribution of the papers is considered a distinct operation from the publication of the paper, the evidence discloses that the Employer's control over the sale of the majority of the newspapers delivered by the carriers and the Employer's unilateral establishment of the terms of the lease and of the routes and delivery times militates against finding the carriers to be independent contractors. Rather, the control exercised by the Employer tends to establish that the carriers operate as part of the Employer's regular business. Accordingly, I find the evidence pertaining to this criterion favors employee status.

9. Parties' Belief as to Employer/Employee Relationship

The contracts between the Employer and the carriers recite clearly that the carriers are to be considered independent contractors. In this regard, the Employer does not withhold income taxes from amounts owed the carriers, 1099 forms are annually issued to them, and they are not provided the fringe benefits that the Employer accords to employees. Additionally, the Employer's only apparent form of "discipline" over carriers is termination of their contracts without notice if the carrier has committed a material breach.

With regard to the type of relationship that the parties believed they were creating in this matter, the evidence is somewhat equivocal. Clearly, the terms of the contracts that the Employer requires carriers to sign reflect the Employer's intention to characterize the relationship between it and the carriers as one between two separate entities, a contractor and a subcontractor. However, the terms of the contracts appear to be non-negotiable. However, on balance, it appears that this factor militates in favor of an independent contractor status for the carriers.

10. Whether Employer is "In the Business"

As discussed above, the work in question here, the delivery of newspapers, is arguably part of the regular business of the Employer. Even if the delivery of the papers is a distinct operation, the control exercised by the Employer over the carriers in the manner discussed above under "Factor 8" militates in favor of finding that the carriers are not engaged in an independent

business. Accordingly, the record evidence regarding this factor favors a finding of employee status for the carriers.

Recent Decisions

As noted above, two recent decisions in Region 9, Cases 9-RC-17754 and 9-RC-17809, involved the same parties and addressed the same issues as those here. Those cases involved petitions to represent carriers working in the Employer's Bullitt and Oldham Counties newspaper distribution operations and the carriers were found to be employees. This matter, however, differs from those cases in a few respects. Thus, the Bullitt and Oldham carriers are compensated primarily on a per piece sold arrangement under which the Employer pays them a set amount for each daily and Sunday paper that they deliver to home or route customers. This is in contrast to the buy/sell arrangement here. However, the practical impact of these different arrangements is minimal in terms of the analysis of employee versus independent contractor status. Like in Cases 9-RC-17754 and 9-RC-17809, there is little risk to the carriers or opportunity for entrepreneurial discretion because of the restrictions placed on the arrangement by the Employer. The same is true of the per piece compensation method found in Cases 9-RC-17754 and 9-RC-17809. Notably, under both arrangements the Employer controls which carriers receive routes and whether routes will be split or combined the carriers sign specific contracts covering the distinct geographical areas determined by the Employer and carriers are limited to delivering papers within that zone.

The carriers' arrangement with the Employer here also differs from the arrangement in Cases 9-RC-17754 and 9-RC-17809 in that they must purchase their own rubber bands and plastic bags to be used in deliveries. They may, however, purchase these minimal cost supplies from the Employer, which simply lists such purchases as a debit on the carriers' billing statements. Thus, there is a distinction between this case and its predecessors in terms of how certain supplies are obtained. However, I view this as a minor distinction, and in the case of the carriers here who obtain such supplies from the Employer, little more than a difference in accounting methods.

Based on the above analysis and taking into consideration whether the carriers are subject to the right of control of the Employer bases on the criteria utilized by the Board in determining whether individuals are independent contractors or employees, I find that the relationship between the Employer and the carriers, on balance, is that of employer-employees. The factual differences between this case and Cases 9-RC-17754 and 9-RC-17809, in which carriers were found to be employees are minor. In reaching my decision, I have carefully examined the Employer's arguments to the contrary and find them unpersuasive.

The Employer's Contentions

The Employer places much reliance on a series of newspaper cases that predate *Roadway* and *Dial-A-Mattress*. However, in each of those cases, as noted above, the Board in applying Agency principles appears to have relied exclusively on the "right to control" rather than taking into consideration all agency factors as approved by the Board in *Roadway* and *Dial-A-Mattress*. Indeed, the Board specifically acknowledged in one such case that "The Board relies primarily on the common law 'right to control' test in the status of individuals alleged to be independent contractors." *Thomson Newspapers*, 273 NLRB 350, 351 (1984), citing *Fort Wayne*

Newspapers, 263 NLRB 854 (1982). The Employer relies on both *Thomson* and *Fort Wayne* in support of its proposition that the carriers are independent contractors. Similarly, in *Evening News*, 308 NLRB 563 (1992), the Board noted that:

> In determining whether individuals are employees or independent contractors, the Board applies the 'right to control test.' If the employer retains the right to control the manner and means by which the results are accomplished, the individual is an employee. If the employer controls the results alone, the individual is found to be an independent contractor. Id. at 564, citing *Glen Falls Newspapers, Inc.*, 303 NLRB 614 (1991); *Drukker Communications*, 277 NLRB 418 (1985).

Both *Glen Falls* and *Evening News* are relied on by the Employer.

The Employer also relies on the Board's decision in *Asheville Citizen-Times Publishing* Company, 298 NLRB 949 (1990) which pre-dates *Roadway* and *Dial-A-Mattress*. In *Asheville*, the Board summarily affirmed the Acting Regional Director's Decision and Order finding carriers to be independent contractors. Id. In reaching this conclusion, the Acting Regional Director predicated his findings on the "right to control test," relying on *Thomson* and *Fort Wayne*. [5]/ A common thread in both the Employer's contentions and these pre-*Roadway* and *Dial-A-Mattress* cases is that they rely unduly on certain criteria, specifically those involving a right of control, and appear to discount those factors which do not include the concept of "control." The Board emphatically rejected this approach in *Roadway*, stating that:

> While we recognize that the common-law agency test described by the Restatement ultimately assesses the amount or degree of control exercised by an employing entity over an individual, we find insufficient basis for the proposition that those factors which do not include the concept of 'control' are insignificant when compared to those that do. Id. at 850.

Although *Roadway* and *Dial-A-Mattress* have established new guidelines in determining independent contract status, I have, nevertheless, carefully considered the pre-*Roadway/Dial-A-Mattress* newspaper cases in reaching my decision in this case. In all the cases cited by the Employer, the carriers had more control over their profits and losses as they purchased their papers and/or were responsible for collections. Here, although the carriers "buy" their papers from the Employer they do so at a set non-negotiated rate and the cost of most of those purchased papers is subtracted from credits held by the Employer for paid in advance subscriptions. Indeed, for the most part, the Employer sells the papers directly to the customers and is responsible for collections. I recognize, and have not ignored, the fact that most of the carriers here make single copy sales to merchants or through racks. However, such arrangements and sales appear to constitute a small portion of the carriers' total sales. In addition, as recognized in Case 9-RC-17809 and as the ALJ noted in *St. Joseph's*, the rationale of the pre-*Roadway/Dial-A-Mattress* cases must be considered in light of the common law of agency test that was adopted by the Board in *Roadway* and *Dial-A-Mattress*. Having considered all the

[5]/ Notably, the carriers in *Asheville* could and did charge higher prices for the newspapers they delivered than the employer recommended, a fact not present here.

common law of agency factors, recognizing that the right of control factor relied on in the pre-*Roadway/Dial-A-Mattress* cases remains the paramount criterion, I find, as discussed above, that the factors here, on balance, support a finding that the carriers are employees.

I disagree with the Employer's contentions in its brief that the Decision and Order that issued on March 11, 1999, in *Philadelphia Newspapers, Inc. d/b/a The Philadelphia Inquirer*, Case 4-RC-19607, is factually on point with the subject case. [6]/ Initially, I note, as pointed out in Cases 9-RC-17754 and 9-RC-17809, that although a decision of another Regional Director often provides instructive analysis, it is not controlling precedent. In any event, and contrary to the Employer's contention, I find that there are significant factual differences between this case and *The Philadelphia Inquirer*. Most significantly, the Regional Director in *The Philadelphia Inquirer* concluded that many of the contractual provisions in the agreements between the employer and its carriers were negotiable. Such negotiable terms included duration of the agreements and differing monetary incentives for performing delivery duties. In contrast, the agreements here, like those in *St. Joseph's* and in Cases 9-RC-17754 and 9-RC-17809, are presented to the carriers on a "take it or leave it" basis. Additionally, in *The Philadelphia Inquirer* the carriers could decide whether to bill and collect from particular subscribers directly or to have the Employer perform these functions for a 5 percent charge. Further, the Regional Director, in *The Philadelphia Inquirer*, placed significant emphasis on the fact that the carriers enjoyed free samples and solicitation and collection incentives. The collection incentives, in particular, were negotiable and could be a flat fee or a percentage of monies collected. In contrast, as previously indicated, any carrier incentives involved here are largely illusory as the carriers cannot effectively compete with the offers that the Employer makes directly to subscribers through telemarketing solicitation. Concededly, there are certain factors in *The Philadelphia Inquirer* similar to those here that militate in favor of independent contractor status for the carriers. However, my analysis of the salient factors and of the applicable legal precedent compels a finding, as was true in Cases 9-RC-17754 and 9-RC-17809, that the Employer's carriers are employees within the meaning of the Act. The carriers here, unlike those in *The Philadelphia Inquirer*, have little, if any, control over the means and method of their work and almost no entrepreneurial opportunity for gain or loss.

Contrary to the Employer's argument, and as noted in Cases 9-RC-17754 and 9-RC-17809, I find that the recent decision issued by the Regional Director for Region 13 in *Allstate Insurance Co*., 13-RC-20827 (December 2, 2002), [7]/ finding that approximately 10,000 exclusive insurance agents for Allstate nationwide were independent contractors, is distinguishable from the subject case. In *Allstate*, the agents, unlike the carriers here, enjoyed substantial entrepreneurial opportunity for gain or loss, had a proprietary interest in their work, determined their own advertising strategies and more importantly, were compensated solely by commission.

In its brief, the Employer also contends that a recent decision issued by the Regional Director for Region 12 in *Times Publishing Co., d/b/a St. Petersburg Times*, 12-RC-8900, like the decision in *The Philadelphia Inquirer* is factually closer to the subject case and better reasoned than the decision of the ALJ in *St. Joseph's*. I disagree. In *Times Publishing*, the Regional Director found that the employer's newspaper carriers were independent contractors

[6]/ No Request for Review was filed in this matter.

[7]/ On March 26, 2003, the Board declined to review the Regional Director's decision.

rather than employees. In reaching this conclusion the Regional Director relied substantially on the fact that the Employer ***negotiated numerous terms*** of its independent contractor agreements with carriers. Negotiations between the employer and its carriers were detailed and significant, averaging four to five hours for each agreement and often spanning two or more meetings. The record disclosed that many economic and non-economic terms were negotiated, including duration, the delivery area, location and time that the carrier must pick up papers, two levels of incentive fees paid to the carrier when he receives less than a negotiated rate of customer complaints, and the maximum rate of complaints permitted per 1,000 subscribers. Other fees negotiated in that case included a delivery fee based on the complexity of the route and other factors, a late truck fee (when the employer fails to deliver the papers to the carriers in a timely manner), fees for assembling and bagging special inserts, fees for securing new subscriptions, a dry newspaper incentive fee, and a subscriber delivery list fee for maintaining an updated subscriber list. Certain charges to the carriers were also negotiated. Some of the carriers also negotiated a right of first refusal for new delivery areas. Once again I note that in stark contrast, the agreements here, like those in *St. Joseph's*, are presented to the carriers on a "take it or leave it" basis. Accordingly, the *Times Publishing* decision and *The Philadelphia Inquirer* decision share more in common with each other than they do with this matter or *St. Joseph's*. Although some factors in *Times Publishing* are similar to those existing in the subject case, the carriers here, unlike those in *Times Publishing* and *The Philadelphia Inquirer*, have little, if any, control over the means and method of their work and almost no entrepreneurial opportunity for gain or loss.

In its brief, the Employer also cited the recent decision of the United States Supreme Court in *Clackamas Gastroenterology Associates v. Wells*, 123 S. Ct. 1673 (2003), as support for its position that the carriers are independent contractors. *Clackamas* involves the issue of whether director-shareholder physicians are counted as employees in determining whether a professional corporation employs the threshold number of employees for coverage and potential liability under the Americans with Disabilities Act. The matter arose when a terminated employee sued the employer, a medical clinic, alleging disability discrimination in violation of the ADA.

The majority in *Clackamas* held that, "the common law element of control is the principal guidepost that should be followed . . ." in determining whether director-shareholders are employees for purposes of the ADA, or whether they are more akin to employers. Id, at 1679. I note, however, that the majority acknowledged that many of the common-law factors used to determine whether a hired party is an employee were not directly applicable to the *Clackamas* case. The Court reasoned that these factors, as set forth in valid precedent and in Restatement (Second) of Agency §220(2) (1958), were not applicable because it was not, "faced with drawing a line between independent contractors and employees." Id, at 1677, fn. 5. This is precisely the type of line that I must draw here and as was drawn in Cases 9-RC-17754 and 9-RC-17809. Accordingly, I conclude that *Clackamas* is inapposite and that it does not overrule or diminish Supreme Court precedent involving a determination of employee versus independent contractor status. See, *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318, 323-324 (1992). Moreover, I have considered the right of control as the primary guidepost in concluding that the carriers here are employees.

Finally, the Employer, in its brief argues that the drivers in *Dial-A-Mattress* are more similar to the carriers here than were the drivers in *Roadway*. Although the Employer's carriers have some similarities to the drivers in *Dial-A-Mattress*, I am of the opinion, based on the factors

discussed above, that the Employer's carriers are more akin to the *Roadway* drivers, whom the Board found to be employees, than the *Dial-A-Mattress* drivers, whom the Board found to be independent contractors. For example, in *Dial-A-Mattress*, the drivers, unlike the carriers here, made substantial investments in their business and could substantial affect their profits or loses. Moreover, the drivers in *Dial-A-Mattress*, unlike the carriers, could take their trucks out of operation for the employer without penalty, where, as here, the carriers must deliver, or make sure that delivery is accomplished everyday or risk losing their contract to deliver papers.

Based on the foregoing, the record as a whole, and having carefully considered the arguments of the parties at the hearing and in the Employer's brief, I find that the Employer has failed to meet the burden of establishing that the carriers are independent contractors. Accordingly, I find that the carriers are employees within the meaning of Section 2(3) of the Act and I will direct an election among the employees in such a unit.

IV. EXCLUSIONS FROM THE UNIT

The record shows, and I find that the following persons are supervisors within the meaning of Section 2(11) of the Act: Louis Sabatini, State Division Manager; Steve Brown; State Supervisor; Danny Hollar; District Manager. Accordingly, I will exclude them from the unit.

V. CONCLUSIONS AND FINDINGS

Based upon the entire record in this matter and in accordance with the discussions above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.

3. The Petitioner claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

> **All the newspaper carriers employed by the Employer from its' Shelby County Drop Building located at 288 Haven Hill Road, Shelbyville, Kentucky, excluding all other employees, managerial employees, and all guards and supervisors as defined in the Act.**

VI. DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by the Graphic Communications International Union, Local 619-M, AFL-CIO, CLC. The date, time, and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

A. VOTING ELIGIBILITY

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less then 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are: (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

B. EMPLOYER TO SUBMIT LIST OF ELIGIBLE VOTERS

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the Regional Office, Region 9, National Labor Relations Board, 3003 John Weld Peck Federal Building, 550 Main Street, Cincinnati, Ohio 45202-3271, on or before **July 23, 2003.** No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for

setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission at (513) 684-3946. Since the list will be made available to all parties to the election, please furnish **two** copies, unless the list is submitted by facsimile, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

C. NOTICE OF POSTING OBLIGATIONS

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

VII. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5 p.m., EDST on **July 30, 2003**. The request may **not** be filed by facsimile.

Dated at Cincinnati, Ohio this 16th day of July 2003.

/s/ Earl L. Ledford

Earl L. Ledford, Acting Regional Director
Region 9, National Labor Relations Board
3003 John Weld Peck Federal Building
550 Main Street
Cincinnati, Ohio 45202-3271

Classification Index

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